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# In the Supreme Court of the United States

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# In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 246

ROBERT SHELTON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 45–56) has not yet been reported. The opinion of the District Court for the District of Columbia (J.A. 10–22; Pet. 32–44) is reported at 148 F. Supp. 926.

### JURISDICTION

The judgment of the court of appeals was entered on June 18, 1960 (Pet. 45). The petition for a writ of certiorari was filed on July 18, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Fourth Amendment forbids the subpoenaing of a person before a Congressional committee unless there is probable cause to believe that he possesses information relevant to the pending inquiry and, if so, whether the Internal Security Subcommittee had such information as to petitioner.

2. Whether the Internal Security Subcommittee hearings involved here infringed upon freedom of the press as protected by the First Amendment.

3. Whether petitioner was apprised and was aware of the subject under inquiry.

4. Whether a defendant, who is indicted by a grand jury composed, in part, of federal employees is entitled to dismissal of the indictment or a hearing on the basis of general allegations that such jurors are biased and afraid as the result of the government security program.

5. Whether the indictment was defective because it failed to specify the subject under inquiry.

6. Whether it was proper for the court to convict and sentence petitioner on each of two counts for his separate refusals to answer two questions.

## STATUTE AND RULE INVOLVED

2 U.S.C. 192 (R.S. 102, as amended) and the pertinent provisions of Senate Resolution 366, 81st Cong., 2d Sess. (1950) are set forth in Appendix B to the petition for certiorari (Pet. 57–58).

## STATEMENT

The petitioner was charged in a three-count indictment with having unlawfully refused to answer three

questions pertinent to matters under inquiry by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary (J.A. 7). Having waived his right to trial by jury (J.A. 9), petitioner was found guilty by the district court on counts 1 and 2. Count 3 was dismissed (J.A. 21–22). Petitioner was sentenced to six months' imprisonment and to pay a fine of two hundred and fifty dollars on each of the two counts, with the sentences of imprisonment to run concurrently (J.A. 22). On appeal, petitioner's conviction was affirmed[1] (Pet. 45–56).

The pertinent facts may be summarized as follows:

On June 28 and 29, 1955, the Senate Internal Security Subcommittee received certain information from Winston Burdett, a newspaperman and broadcaster, in connection with its continuing investigation since 1950 into Communist subversion and the operation of the internal security laws (Tr. 83).[2] Burdett's testimony concerned attempts of the Communist Party to influence public opinion by infiltration of Party members into the newspaper field.[3] Subsequent to Bur-

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[1] The court of appeals delayed argument and determination of this case, along with seven other contempt of Congress cases until after the decision of this Court in *Barenblatt* v. *United States*, 360 U.S. 109. See the Government's Br. in Opp. in *Deutch* v. *United States*, No. 233, this Term, pp. 8–9.

[2] "Tr." refers to the transcript of the trial proceedings.

[3] Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, U.S. Senate [hereinafter "Hearings], 84th Cong., 1st Sess., Part 14, pp. 1323–1363.

dett's testimony, the subcommittee received information that a man by the name of "Shelton," said to be employed on the editorial or news side of the *New York Times*, was a member of a Communist group among the staff of that organization, that he was active in the affairs of this group, and that he was in a position to furnish the subcommittee with information concerning Communist activity (Tr. 44–45). The first name of the person identified as "Shelton" was not given. Although this information came to the subcommittee by letter signed with a pseudonym, the identity of the writer was known to a former counsel of the subcommittee, Robert Morris (Tr. 138). With respect to the source of the information, Julian G. Sourwine, chief counsel of the subcommittee, testified at the trial (Tr. 138):

> We had received other letters from this same individual. I knew by the appearance of the letter, the way it was typed and the pseudonym which was signed to it, that it came from this same individual who had given us leads before which proved out and concerning whom Judge [Robert] Morris had stated that he knew him and that he was a reliable person.

Still unaware of Shelton's first name, the subcommittee caused a subpoena to be issued, addressed to "Willard Shelton," at the *New York Times* in New York City (Tr. 46). This name was a mistake since Willard Shelton was not the person actually sought by the subcommittee (Tr. 46). Mr. Sourwine later concluded, after an investigation by himself, that someone in the typing section of the subcommittee staff confused the "Shelton" to be subpoenaed with one

Willard Shelton, who is likewise a newspaperman but who was not employed by the *Times* or sought by the subcommittee (Tr. 139).

The subcommittee employee who went to New York City to serve the subpoena, along with other subpoenas, soon ascertained that no Willard Shelton was employed by the *New York Times* (Tr. 46). He was told that a Robert Shelton (the petitioner) was an employee of that organization and he was the only "Shelton" on the editorial or news side (Tr. 46; 144–145). The subcommittee employee added the words "or Robert Shelton" to the subpoena and upon instructions of the subcommittee served the subpoena on petitioner (Tr. 46).

Nonetheless, between the time that the subpoena was issued and petitioner's appearance, the subcommittee (Tr. 153)—

> * * * made a thorough check of all the sources that were available to us to see what there might be on a Robert Shelton or what there might be on a Shelton who might be the Robert Shelton that we were talking [about]. And we accumulated those things from all the sources available to the committee and then attempted in the hearing to see if this was the same individual.

As part of the information available, the subcommittee had under the name Shelton (without a first name) three, four, or five "leads." As explained by Mr. Sourwine (Tr. 152–153):

> We had here a man who was Robert Shelton, who was a newspaperman. It was of some importance to the Committee, while he was on

> the stand, to ascertain whether he was the same person as any of these other individuals. It is a procedure which we follow wherever it is possible, where time will permit: we have a witness who may be the same as a person not adequately identified in our files. We ask a question or questions for the purpose of establishing that, because even if we learn that he is not, we have accomplished something in getting a little further with our investigation.

Petitioner, represented by counsel, first appeared at an executive session of the subcommittee, in New York City, on December 7, 1955. Petitioner was advised by subcommittee counsel that the purpose of the appearance was to clarify the question of identity (Tr. 50). Upon being queried as to Communist Party membership, petitioner immediately responded that he had a statement to read to the subcommittee (Tr. 52). The statement, which was then read, objected in substance to the subcommittee's inquiry into petitioner's Communist Party membership on the grounds that the subcommittee lacked jurisdiction and the inquiry infringed his rights under the First Amendment (Tr. 52–56).

In view of petitioner's attitude, Counsel Sourwine suggested that the subcommittee might wish to pursue its questioning at a future session (Tr. 58–59). Petitioner was therefore recalled, and appeared in open session in Washington, D.C., on January 6, 1956 (Tr. 75–76). At the outset of the January 6, 1956, hearing, petitioner interposed several objections to his having been called before the subcommittee. These objections included: an objection to the juris-

diction of the subcommittee on the ground that petitioner's testimony in executive session made clear that no information would be obtained relating to the subcommittee's legislative purpose; the claim that questioning "might subject me to prosecution in violation of my right to be tried in the community where I work and live"; and the statement that he did not "see why I am involved in this hearing, which the chairman said on Wednesday, stems from the Burdett testimony. There was no reference to me in the Burdett testimony nor in the testimony of Clayton Knowles" (Tr. 105–106). In this last objection, petitioner showed that he was aware of the opening statement of the Chairman of the subcommittee on January 4, 1956, which set forth the subject under inquiry as Communist infiltration into the newspaper field in order to allow the international Communist conspiracy to carry on its "psychological warfare against the United States" Hearings, pt. 17, p. 1587.

In the course of the hearing, petitioner was asked: "Are you, sir, a member of the Communist Party, U.S.A.?" (Tr. 109). After consultation with his counsel, petitioner said that "I decline to answer on the grounds of the First Amendment and challenge to the jurisdiction of the Committee" (Tr. 110). He was then permitted to read a lengthy statement in which he restated his refusal to answer the question on the basis of the First Amendment and due to the lack of jurisdiction of the subcommittee (Tr. 111–119). These objections were overruled by the Chair-

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man, who ordered him to answer the question (Tr. 119). Petitioner persisted in his refusal to answer the question (Tr. 119) and Count 1 of the indictment is predicated upon this refusal (J.A. 8).

Later in the hearing, petitioner denied "any knowledge respecting a Communist attempt to take over control of Typographical Union No. 6" and further denied having "discussed with Matilda Landsman the question of any Communist activity in that union" (Tr. 123). As disclosed at the trial Matilda Landsman was believed by the subcommittee to be an employee of the *New York Times* in the typographical department who was a member of Typographical Union No. 6 and of the Communist Party (Tr. 68). Following these denials by petitioner, he was then asked (Tr. 123):

> Now for the purpose of testing the credibility of that answer, sir, I will ask you, did you ever have any conversation with Matilda Landsman?

Petitioner refused to answer this question on the grounds set forth in his prepared statement which had previously been read. The Chairman ordered petitioner to answer the question on penalty of contempt of the Senate, but petitioner persisted in his refusal (Tr. 124). Count 2 of the indictment is predicated upon this refusal (J.A. 8).

## ARGUMENT

1. Petitioner urges (Pet. 21–25) that the subpoena issued to him violated his rights under the Fourth Amendment because the subcommittee did not have probable cause to believe that he possessed informa-

tion relevant to the pending inquiry. This contentio is without substance. First, petitioner, while statin that he did not see how he was involved in the sub committee's investigation when he appeared befor the subcommittee (Tr. 105–106), raised no objectio to the subpoena on the ground of the Fourth Amend ment. Petitioner could therefore not raise this issu for the first time at his trial. Cf. *United States* v *Bryan*, 339 U.S. 323, 327–335.

Second, even assuming *arguendo* that there is suc a constitutional requirement of "probable cause" unde the Fourth Amendment, the record demonstrates—an the district court found (Pet. 40)—that the subcommi tee had sufficient reason to examine petitioner as to h knowledge of the presence and activities of Communis in the newspaper business in New York (see the Stat ment, *supra*, pp. 3–5). The subcommittee knew th the Communist Party was trying to infiltrate the new paper field and had been informed by a reliable sour that a person named Shelton who was a member of Communist group was working on the editorial or ne staff of the *New York Times*. The fact that the su committee did not know the first name of petition does not detract from the fact that it had a reasonab basis for believing that the only Shelton employed the editorial or news staff of the *Times*, whatever h first name, possessed information of use to the subco mittee in its investigation of Communist activiti And, even if the constitutional right petitioner clai does in fact exist, certainly Congressional committe must have broad discretion as to what witnesses call, and only in the clearest of cases, if at all, shou

the mere issuance of the subpoena be called in question in the courts.

Moreover, while the Fifth and First Amendments[4] protect witnesses who appear before Congressional committees, neither the language of the Fourth Amendment nor the decisions of this Court suggest that the scope of the Amendment extends to subpoenas to testify. On the contrary, the Amendment makes clear that it was intended to protect "persons, houses, papers, and effects" from improper search or seizure, and not, like the Fifth Amendment, to protect witnesses from being forced to testify. This Court has never held that the Fourth Amendment is relevant to subpoenas requiring witnesses to appear and testify. In *Boyd* v. *United States,* 116 U.S. 616, and the other cases cited by petitioner (Pet. 23–24), the Court decided that the Fourth Amendment applies to subpoenas *duces tecum* because the "compulsory production of a man's private papers" "accomplishes the substantial objects of [the] acts" of "forcible entry into a man's house and searching amongst his papers". 116 U.S. at 622. In contrast, the requirement that a person appear briefly before a Congressional committee does not accomplish the

[4] If "petitioner's appearance as a witness follow[ed] from indiscriminate dragnet procedures lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee," he might be freed from being required to answer the questions involved here by the First Amendment. See *Barenblatt* v. *United States*, 360 U.S. 109, 134. Petitioner's First Amendment contention is discussed *infra*, pp. 11–13.

substantial object—or interfere with his right to the same extent—as seizure of his person by arrest.[5]

2. Petitioner contends (Pet. 28–29) that the subcommittee's investigation violated freedom of the press protected by the First Amendment since in fact the subcommittee was investigating the press, not Communist infiltration into it. Insofar as petitioner's contention depends on his claim that the subcommittee was not investigating Communist infiltration into the press, it is squarely contradicted by the findings of the district court (Pet. 42–43) and the record. All the questions asked petitioner were either directly related to Communist activities or were preliminary inquiries intended to lead up to such questions. After petitioner had testified, the subcommittee asked other members of the press similar questions concerning Party activities. In addition, the record shows that the questions were not a mere fishing expedition, as the subcommittee had information that Communists had infiltrated into the press (see the Statement, *supra*, p. 3) and this information was confirmed by testimony taken the same day as petitioner appeared (Hearings, pt. 17, pp. 1732, 1739, 1777, 1791).

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[5] Petitioner quotes (Pet. 23) a very broad statement of the coverage of the Fourth Amendment from Mr. Justice Brandeis' dissenting opinion in *Olmstead* v. *United States*, 277 U.S. 438, 478. But this statement is directed at physical invasions of privacy or their equivalent such as wire-tapping—which was the action involved in that case—since it is based (see 277 U.S. at 477–478, and notes 4–10) on a synopsis and citation of cases involving actual physical invasion of privacy (*e.g.*, *Weeks* v. *United States*, 232 U.S. 383, or improper use of subpoenas *duces tecum* which this Court has held has substantially the same effect as a physical invasion (*e.g.*, *Boyd* v. *United States*, *supra*).

Since the subcommittee was investigating not the press as a whole, but Communist infiltration into it, it is clear that petitioner's reliance on the First Amendment is misplaced. First, Congressional committees can investigate Communist infiltration of the press, just as they can inquire into Communist infiltration in the field of education (*Barenblatt* v. *United States*, 360 U.S. 109, 125–134),* an area likewise protected by the First Amendment. As the court below stated (Pet. 54):

> * * * The investigatory power of Congress flows from the right of the government to preserve itself and its institutions. The important right of the press to be free and independent is not impaired by an inquiry into possible abuse of the right which is directed at destroying the very freedom the First Amendment assures. * * *

Second, this subcommittee, as part of its investigation of Communist infiltration of the press, could properly call petitioner to testify before it. In subpoenaing petitioner, it is plain that the subcommittee was not engaging in "indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee." *Barenblatt* v. *United States*, *supra*, 360 U.S. at 134. On the contrary, as we have shown (*supra*, pp. 3–5, 9), the subcommittee had a reasonable basis for believing that the only Shelton employed on the editorial or

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* Earlier, this Court had held that the press, like other business, is not protected by the First Amendment from general, nondiscriminatory legislation and investigations. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186.

news staff of the *Times* possessed information of use to the subcommittee in its investigation of Communist activities in the press.

3. Petitioner claims (Pet. 25–28) that he was not adequately apprised by the subcommittee of the subject under inquiry so that he could determine whether the questions asked him were pertinent to this subject. But petitioner failed to raise the issue of pertinency at the time the questions were asked so as to "trigger what would have been the Subcommittee's reciprocal obligation had it been faced with a pertinency objection." *Barenblatt* v. *United States, supra,* 360 U.S. at 124. While he did state as one of his general objections that "[I fail to] see why I am involved in this hearing" since no prior witnesses had mentioned him (see the Statement, *supra,* p. 7), this does not appear to be the kind of clear objection to pertinency required by this Court in *Barenblatt.* Moreover, this objection was made prior to being sworn, before any questions had been asked, and was not repeated as to either question which was the subject of petitioner's conviction. Instead, petitioner orally stated, after consultation with counsel, that he objected to the question whether he was a Party member on the grounds of the First Amendment and the subcommittee's lack of jurisdiction. The lengthy statement which he read to the subcommittee after being asked this question and which he also invoked after being asked whether he had talked with Matilda Landsman raises only these same two grounds. And petitioner explicitly told the subcommittee that the grounds given in the written statement were the only ones he was raising (see the

Statement, *supra*, pp. 7–8). Petitioner's omission of any objection as to pertinency is significant since, in response to two other questions asked by the subcommittee, he specifically objected on the ground of pertinency (Tr. 108; 125). Thus, petitioner knew how to object to the pertinency of particular questions but, apparently because he understood the pertinency of these two particular questions, deliberately did not raise this objection as to them.

In any event, the record supports the finding of fact of the district court (Pet. 41–42, 43), which was affirmed by the court of appeals (Pet. 50–52), that petitioner was apprised and was aware of the subject of the hearing at which he appeared. Having been subpoenaed to testify on January 6, 1956, petitioner was presumably in the room when, only moments before he himself was called, Senator Hennings, a member of the subcommittee, stated (Tr. 93):

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts, or indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication.

At the beginning of his own testimony, petitioner indicated that he had heard or read (1) the subcommittee Chairman's opening statement at the hearings two days earlier at which he had stated that the subject of the hearings was Communist infiltration into

the newspaper field[7] and (2) the testimony of two witnesses on this same subject.[8]

4. Petitioner claims (Pet. 29–30) that the indictment should have been dismissed or a hearing granted due to the possible "fear and bias" of members of the grand jury who were federal employees. This argument, which is without substance, is answered in our brief in opposition in *Russell* v. *United States*, No. 239, this Term, pp. 5–8, pending on petition for a writ of certiorari, to which we respectfully refer the Court.

Petitioner, like the defendant in *Russell*, completely failed to show or even allege the strong, individual, and specific facts of bias necessary to dismiss the indictment or obtain a hearing. In fact, unlike Russell, he did not even offer proof that government employees *in general* were so intimidated by the government security program that they were biased in Communist cases. Instead, he broadly claims that

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[7] Petitioner argues (Pet. 26–27) that the bill of particulars makes the subject under inquiry that stated in the resolution authorizing the Senate Judiciary Committee, not the lesser inquiry of Communist infiltration in the newspaper field, and that this declaration is binding on the government. In fact, however, the "bill of particulars" refers to an oral statement made by the Assistant United States Attorney before the district court which was made in reference to the authority of the subcommittee rather than to pertinency or the subject under inquiry (J.A. 5–6). It is perfectly consistent with this statement for the government to claim and prove that the actual subject under inquiry when petitioner appeared as a witness was narrower than the entire area which the full Committee and subcommittee were authorized to investigate.

[8] See the Statement, *supra*, p. 7, and the testimony of Winston Burdett and Clayton Knowles, Hearings, pt. 14, pp. 1323–1363; *id.* pt. 17, pp. 1635–1645.

the mere presence of government employees on the grand jury made the indictment invalid, or, alternatively, that he had the right to interrogate all the employee-grand-jurors in order to show their fear and bias. Certainly, petitioner has no such right to conduct a sweeping investigation into the attitudes and psychology of all these jurors on the basis of merely his hope of finding something more definite.

5. Petitioner argues (Pet. 29) that the indictment was defective because of its failure to specify the "question under inquiry." Since the indictment (J.A. 7) was in this respect precisely the same as that in *Russell* v. *United States*, *supra*, No. 239, this Term, we respectfully refer the Court to our brief in opposition in that case (pp. 8–10).*

6. Lastly, petitioner contends (Pet. 30) that the district court erred in fining petitioner separately on two counts. But under 2 U.S.C. 192 each refusal to answer a pertinent question is a separate offense. Moreover, the record in this case does not suggest any attempt by the subcommittee to multiply contempts. Petitioner made no general refusal to answer all questions, or even all questions in a particular area; in fact, the question forming the basis of count two

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*As in *Russell*, it is clear that petitioner was not left in doubt at trial as to the subject under inquiry, since the record shows that petitioner knew the subject at the time of the hearing (see *supra*, pp. 14–15).

(J.A. 7–8) was asked for the purpose of testing the credibility of a previous answer given by petitioner.[10]

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
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J. WALTER YEAGLEY,
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AUGUST 1960.

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[10] Petitioner states (Pet. 21, 31) that certiorari should be granted because the issues raised in this petition are now before the Court in *McPhaul* v. *United States*, No. 33, this Term, certiorari granted, 362 U.S. 917; *Wilkinson* v. *United States*, No. 37, this Term, certiorari granted, 362 U.S. 926; and *Braden* v. *United States*, No. 54, this Term, certiorari granted, 362 U.S. 960. One of the issues raised by petitioner—whether the indictment must specify the subject under inquiry—is also involved in *Braden*. But while we cannot, of course, know the reasons why the Court granted certiorari in that case, we believe that this issue is without substance, being controlled by clear judicial precedent, and is distinctly subsidiary to the more serious issues involved in *Braden*. Although contentions as to whether the subcommittee adequately apprised the witness of the subject under inquiry and as to his rights under the First Amendment are also raised in the three pending cases, determination of these issues, in view of this Court's holding in *Barenblatt* (see 360 U.S. at 123–124, 127–134), depends on the particular facts of each case.

U.S. GOVERNMENT PRINTING OFFICE 1960

SUPREME COURT, U. S.

No. 9

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 196**

ROBERT SHELTON,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## REPLY MEMORANDUM FOR PETITIONER

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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

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**No. 246**

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ROBERT SHELTON,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## REPLY MEMORANDUM FOR PETITIONER

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One would have hoped that the United States Government, in a case involving a six-month prison sentence for a young newspaperman untainted by any previous brush with the law, would have leaned over backwards to present the case fairly to this Court. Even if petitioner's case cannot be deemed sufficiently compelling to evoke a confession of error from the Government, it certainly does not deserve the misleading response which the Government has now filed. More in sorrow than in anger that the Govern-

ment should place "victory" above justice, we encroach upon the Court's time in this reply memorandum to call attention to two totally misleading contentions on vital points in the Government's opposition to certiorari.

## I

The Government pitches its entire argument that there was probable cause to call petitioner as a witness on the ground that the Subcommittee "had been informed by a reliable source that a person named Shelton who was a member of a Communist group was working on the editorial or news staff of the *New York Times*" (p. 9). But there is not one single, solitary shred of evidence to support this statement;[1] what the Government seeks to accomplish by the quoted statement is to have this Court assume the existence of an alleged "letter" without considering petitioner's successful challenge to its existence.

At the trial, Mr. Sourwine testified about an anonymous "letter" and this was the Government's case on probable cause. But Sourwine's testimony, as pointed out in the Petition (pp. 10-11), was conflicting and inherently unbelievable[2] and on top of this Sourwine refused to produce the "letter." In view of this, the District Judge had to, and did, refuse to find that the "letter" existed and to rely upon its existence; instead, he held that probable cause

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[1] That an alleged "letter" was the only information the Subcommittee even claimed to have appears from Mr. Sourwine's testimony that "the anonymous letter was all that we had about this individual . . ." (Tr. 153); that this "letter" is not before the Court is demonstrated in the Petition (pp. 8-15).

[2] One incredible inconsistency is worth repeating here. Sourwine testified at the trial that the Subcommittee had information (from the "letter") "that this man named Shelton *was* a member of the Communist group in the New York Times" (Tr. 45). But, if they had had such a letter, why did Sourwine say at the first hearing that "The record will show that the witness *was not* charged with being a Communist" (Tr. 58)? (Emphasis supplied)

was not required and then added, as an afterthought, that probable cause could be found in the Subcommittee's information of "Communist infiltration into . . . elements of the New York newspapers, including the one by which defendant was employed" (Petition, p. 40). Nor did the Court of Appeals rely upon the alleged and unproduced "letter"; it left unclear the question whether probable cause was required and simply answered petitioner's arguments on probable cause with the statement that the Subcommittee could call petitioner "as a member of the working press to check on possible Communist Party activities among his fellow employees" (Petition, p. 56).

The posture of the case in this Court is thus quite remarkable. The Government has jettisoned the arguments of both lower courts that probable cause for calling petitioner could somehow be found in Communist infiltration of "New York newspapers" or the "working press" generally without regard to the question whether the Subcommittee had any information concerning petitioner. Now the Government stakes its argument on the existence of probable cause upon a "letter" which it will not produce and upon which neither of the courts below was willing to rely. Without so much as mentioning or answering a single one of petitioner's contentions that the "letter" did not exist and could not be considered as probable cause without being produced (Petition, pp. 8-15), the Government simply proclaims to this Court out of thin air that the Subcommittee "had been informed by a reliable source that a person named Shelton who was a member of a Communist group was working on the editorial or news staff of the *New York Times*" (p. 9). The Government, in a word, is asking this Court to assume the existence of the "letter" without knowing the Government's answers, if any, to petitioner's contentions, without petitioner having the right

to respond to those answers, if there are any, and in the face of petitioner having persuaded both lower courts that they could not reply upon the alleged "letter."

The Government suggests, too, that the Fourth Amendment does not extend to subpoenas to testify (pp. 10-11).[3] Although the cases cited in the Petition (pp. 23-25) appear to reject the Government's distinction between a subpoena to testify and a subpoena to testify and bring along a single sheet of paper, the relevant consideration for present purposes is the Government's concession *sub silentio* that the applicability of the Fourth Amendment to Congressional Committee witnesses is a question of substantial importance.

## II

Even more misleading than its sleight-of-hand reliance upon the alleged but unproduced "letter", is the Government's answer to petitioner's argument predicated upon the bill of particulars. Petitioner argued that (Petition, pp. 18, 26-28), since the Government had given petitioner a bill of particulars that the full authorizing resolution of the Subcommtitee was the question under inquiry, it could not, as it tried to do, rely upon a lesser or different question under inquiry at the trial or on appeal. The Government, having no possible answer to petitioner's contention,

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[3] The Government weakly suggests that petitioner "raised no objection to the subpoena on the ground of the Fourth Amendment" (p. 9). We do not believe that *United States* v. *Bryan*, 339 U.S. 323, requiring a witness to raise the absence of a quorum (which could be remedied on the spot) is any precedent for requiring a witness to raise the issue of probable cause (which could not be so remedied). At any rate, the petitioner did raise the question of probable cause in dramatic terms at the opening of the hearing when he said "I fail to see why I am involved in this hearing . . ." (Tr. 105). Also in his prepared statement which he read at the hearing, petitioner said, "I am involved in these hearings as a victim of accident" (Tr. 114). Short of using the legal words "Fourth Amendment" or "probable cause," we wonder what better phrase petitioner, a layman, could have used.

just states that there was no such bill of particulars. Its statement on this score is worth quoting in full (p. 15, n. 7):

> "Petitioner argues (Pet 26-27) that the bill of particulars makes the subject under inquiry that stated in the resolution authorizing the Senate Judiciary Committee, not the lesser inquiry of Communist infiltration in the newspaper field, and that this declaration is binding on the government. In fact, however, *the 'bill of particulars' refers to an oral statement made by the Assistant United States Attorney before the district court which was made in reference to the authority of the subcommittee rather than to pertinency or the subject under inquiry* (J.A. 5-6). It is perfectly consistent with this statement for the government to claim and prove that the actual subject under inquiry when petitioner appeared as a witness was narrower than the entire area which the full Committee and subcommittee were authorized to investigate." (Emphasis supplied)

This statement is misleading in two respects: In the first place, the Government's statement suggests that only an "oral statement" rather than a "bill of particulars" was given. But the Joint Appendix is crystal clear to the contrary. After petitioner's motion to dismiss the indictment was denied (J.A. 5), counsel for petitioner asked for "*a bill of particulars*" and Government counsel stated flatly, "I will waive written notice of *the bill of particulars*" (J.A. 5). (Emphasis supplied) Thereafter, Government counsel gave such a bill of particulars (J.A. 5-6) and the District Court stated that "*the Government has supplied the bill of particulars orally*" (J.A. 6). (Emphasis supplied) For the Government now to suggest that there is some difference between this "oral statement" and a "bill

of particulars" is to put every defendant on notice that he can never safely accept an oral statement in open court as a bill of particulars even when the District Court and Government counsel both call it a bill of particulars.[4]

Secondly, the Government's statement bluntly asserts that the bill of particulars "was made in reference to the *authority of the subcommittee* rather than to pertinency or the *subject under inquiry*" (Emphasis supplied). This statement is not misleading; it is palpable error. Petitioner's counsel asked for a bill of particulars on both the authority of the Subcommittee and the question under inquiry in these words:

> "Mr. Silard. The request of the bill is for the same information as the first point of our motion to dismiss, that is, for the specific authority under which the subcommittee was said to be conducting hearings and, secondly, for the *nature of the question under inquiry* before said committee" (J.A. 5). (Emphasis supplied)

Government counsel, after giving the authority of the Committee (J.A. 5-6), went on as follows:

> "As to the *second asking,* the Government contends, and the indictment states, that the inquiry be-

[4] The Government's argument becomes even more shocking when laid alongside of another of petitioner's contentions. Petitioner argued (Petition, p. 29) that the indictment was defective because of its failure to specify "the question under inquiry." In response (p. 16), the Government refers the Court to its argument in *Russell* v. *United States*, No. 239. In its *Russell* opposition, the Government, arguing against the necessity for pleading the question under inquiry in the indictment, states that "if petitioner was left in any doubt, he could easily have moved for a bill of particulars" (p. 10). Petitioner, having done exactly what the Government suggests—having obtained a bill of particulars on the question under inquiry—the Government now seeks to annul its binding effect. Certainly the Government cannot have it both ways—either the indictment must contain the question under inquiry or a bill of particulars supplied by the Government must bind the Government as though included in the indictment.

ing conducted was pursuant to this resolution. *We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.*

"This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose so that, in that sense, *the asking No. 2 of counsel will be supplied by his reading the resolution*" (J.A. 6). (Emphasis supplied).[5]

Thus, it is perfectly clear from the Joint Appendix that, instead of an oral statement concerning the authority of the Subcommittee, as the Government states, there was actually a bill of particulars that the question under inquiry was the full scope of the authorizing resolution. This bill of particulars thus settles the case against the Government for it does not even suggest that the full authorizing resolution (Petition, pp. 57-58) could possibly have the specificity to stand as a question under inquiry against which pertinency is to be tested. See *Watkins* v. *United States*, 354 U.S. 178, 209. And the Government's argument that the courts below found that petitioner was apprised of the question under inquiry falls in the face of the fact that the courts below found more limited questions under inquiry than the bill of particulars by which they and the Government were both bound.[6]

So the Government is forced back upon its desultory

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[5] It should be noted that Shelton was tried before this Court's *Watkins* decision. At that time the Government took the position that the Committee had no duty to "state for the record the subject under inquiry . . . and the manner in which the propounded questions are pertinent thereto." *Watkins* v. *United States*, 354 U.S. 178, 214-215.

[6] Although the petition for certiorari (pp. 17-20) sets forth six different possible questions under inquiry asserted by one or more Senators, by Sourwine, by Government counsel, and by the courts, the Government even now refuses to disclose to this Court just what it deems to be the question under inquiry of which petitioner was supposed to be apprised. If the Government even now cannot determine what the question under inquiry was, it seems a little too much to expect petitioner to have figured it out at the hearing.

argument that petitioner failed to raise the issue of pertinency. But, prior to being sworn at the hearing, petitioner challenged the "jurisdiction of the committee" on the ground that "the committee will obtain no information from me that could possibly assist it in any legislative purpose" and added, "I fail to see why I am involved in this hearing, which the Chairman said on Wednesday stems from the Burdett testimony" (Tr. 105). Petitioner reaffirmed this challenge to the "jurisdiction of the committee" repeatedly, including when asked the questions for which he was cited (Tr. 109-111, 124). What more could petitioner have said except to use the exact word "pertinency"; certainly a layman is not held to the standard of a lawyer's pleading in stating what he obviously has in mind.[7]

[7] It must always be remembered that petitioner had to make this objection in his own words rather than through his counsel. Lawyers are not allowed to make objections for their clients at hearings of the Subcommittee. While the witness and his lawyer may hold a whispered consultation during the course of the hearing, the final words that come out are those of the witness not of the lawyer. Holding the witness to the standard of a legal objection is to require a layman to do a lawyer's work. Furthermore, if technically-perfect objections are going to be required for a witness to avail himself of the *Watkins* rule, it would appear to be a denial of the right to counsel to require the witness to phrase the objection in his own words.

## Conclusion

Wherefore, it is respectfully submitted that certiorari should be granted and the case set for argument with *McPhaul*, *Wilkinson*, and *Braden*.[8]

Respectfully submitted,

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*Washington 6, D. C.,*
*Attorneys for Petitioner.*

(1767-3)

[8] The Government concedes that the issues at bar substantially overlap those in *McPhaul*, *Wilkinson* and *Braden*, but argues that each case "depends on the particular facts" (p. 17, n. 10). Certainly the compelling facts here involved present an apt vehicle for the resolution of the admittedly overlapping issues.

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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

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ROBERT SHELTON,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## SUPPLEMENTAL MEMORANDUM FOR PETITIONER

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*1631 K Street, N. W.,*
*Washington 6, D. C.*
*Attorneys for Petitioner.*

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

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**No. 246**

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ROBERT SHELTON,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## SUPPLEMENTAL MEMORANDUM FOR PETITIONER *

The Supplemental Memorandum for the United States first confesses that its Brief in Opposition "was incorrect" (p. 2) and in "error" (p. 3) and then proceeds to repeat and compound the error. The government admits (pp.

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* This Memorandum was originally filed in multilith form on October 1. The Government's Supplemental Memorandum was not received by petitioner until 5:00 P.M. Thursday, September 29th, some five weeks after the filing of petitioner's memorandum pointing out the error which the government now concedes. Since it was necessary to file this memorandum prior to the Court's consideration and decision on the petition for certiorari, there was insufficient time for printing prior to filing.

2-3) that the Assistant United States Attorney did provide a bill of particulars that the "question under inquiry" was the full scope of the authorizing resolution and not a smaller, more limited inquiry. Having admitted that much, we are at a total loss to understand the government's last-minute contention that this bill of particulars was somehow "not binding on the government so as to restrict the exact subject under inquiry which the government intended to prove" (p. 4) and its return to its earlier characterization of the bill of particulars as "the prosecutor's oral statement as to the subject of the inquiry" (p. 5). But whatever the government may be trying to say in its desperate effort to escape its own bill of particulars,[1] its admission that there was a bill of particulars that the question under inquiry was the full scope of the Committee's resolution and nothing less, demonstrates at the very least the following four points:

1. The government's concession that the Assistant United States Attorney gave a bill of particulars that the question under inquiry was the full Committee resolution and not a smaller, more limited inquiry concedes away the government's argument that petitioner was aware of such a smaller, more limited inquiry, at the hearing before the Committee. The Assistant United States Attorney gave his bill of particulars after full consultation with the members and counsel for the Committee and the bill of particulars which he gave certainly reflected the question under

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[1] It should be noted that the quotation from the Assistant United States Attorney on which the government relies in its effort to escape the bill of particulars (p. 4), is from his argument opposing the Motion to Dismiss, *not* from the bill of particulars. Even if it had been given as part of the latter, however, it could not have affected the Assistant United States Attorney's direct, particular and explicit statement that the Committee resolution and no more limited inquiry was the question under inquiry.

inquiry the Committee deemed before it at the time of the hearing. Petitioner can not fairly be charged with being aware (Gov't. Supp. Memo, p. 3) of another more limited question under inquiry at the hearing in the face of the governmental admission that the question under inquiry was the full resolution and *not* the more limited question of which petitioner was supposed to have been aware.[2]

2. The government's contradiction in this Court of its own bill of particulars on the question under inquiry in the trial court illustrates far better than anything we can say the importance of strict adherence to the *Watkins* rule. Here the government affirms that the Assistant United States Attorney gave a bill of particulars setting forth one question under inquiry and then goes on stubbornly to assert a different question under inquiry. "Certainly, if the point is that obscure after trial and appeal, it was not adequately revealed to petitioner when he had to decide at his peril whether or not to answer." *Watkins* v. *United States*, 354 U.S. 178, 214. We do not see how it can be indisputably and contemporaneously clear to a lay witness that the Committee is interrogating him on a precise and narrow subject of inquiry when, after extensive preparation of the trial and examination of the printed hearings, it is equally clear to the government's expert counsel that there was no such narrowly defined subject of inquiry.

3. The government's effort to escape from its bill of particulars further validates petitioner's contention that the indictment should state the question under inquiry. We cannot believe the government would have sought to play as fast and loose with an indictment as it is now seeking

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[2] The government apparently concedes that the full resolution cannot stand as a sufficiently precise "question under inquiry" against which to measure pertinence. This point was made in the petition (pp. 27-28) and no answer is suggested either in the government's Brief in Opposition or in its Supplemental Memorandum.

to do with a bill of particulars. Indeed, the government concedes as much (p. 5, n. 3), as it must in view of *Stirone* v. *United States*, 361 U.S. 212.

4. Finally, nothing could have been more prejudicial than what happened here. Under the statute, the government had to prove *beyond a reasonable doubt* the pertinence of the unanswered questions to the question under inquiry. *Quinn* v. *United States*, 349 U.S. 155, 165; *Bowers* v. *United States*, 202 F. 2d 447, 452. Petitioner's "pertinence" defense was predicated upon the fact that the question under inquiry was the full resolution. Indeed, when petitioner's counsel made his argument to the District Court as the trier of the facts (Tr. 291), he expressly argued to the Judge, on the basis of the bill of particulars, that he had "to find these questions pertinent to . . . the full scope" of the resolution (Tr. 292), and the Court asked counsel to "particularly direct" his argument to this point (Tr. 292). Yet, the District Judge, urged on by the government in flagrant disregard of its bill of particulars, found beyond a reasonable doubt that the unanswered questions were pertinent to a wholly different "question under inquiry." We can think of nothing more prejudicial than conviction for a crime different from that which the government has judicially elected to prove against the defendant.

## Conclusion

We respectfully suggest that this case presents an unusually apt vehicle for elucidation of the various problems which have arisen on the "question under inquiry" point in the *Watkins* case.

We would further respectfully suggest that the government's Supplemental Memorandum (p. 1) concedes the absence of any factual basis for probable cause in summoning petitioner, leaving its sole reliance upon the contention that

the Fourth Amendment does not apply to subpoenas to testify. Petitioner's detailed demonstration (Reply Memorandum for Petitioner, pp. 2-4) that the Sub-committee had no information whatever concerning petitioner is met by stony silence. The government's willingness thus to rest on its argument that the Fourth Amendment does not apply to Congressional subpoenas to testify presents a question of substantial importance for this Court's review.

WHEREFORE, it is respectfully submitted that certiorari should be granted and the case set for argument with *McPhaul*, *Wilkinson*, and *Braden*.

Respectfully submitted,

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JOHN SILARD,
*1631 K Street, N. W.,*
*Washington 6, D. C.*
*Attorneys for Petitioner.*

OCTOBER 5, 1960.

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# In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

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ROBERT SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington, D.C.

# In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 246

ROBERT SHELTON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted to clarify a footnote in the Government's Brief in Opposition (p. 15, fn. 7) which has been discussed in Petitioner's Reply Memorandum (pp. 4–8). We will therefore not address ourselves to petitioner's contentions, in his Reply Memorandum (pp. 2–4), concerning the issue of probable cause raised in this case. This matter has been fully covered in the Brief in Opposition (pp. 8–11).

In its Brief in Opposition, the government (pp. 13-15) answered petitioner's contention that the subcommittee had not apprised petitioner of the subject under inquiry. The government contended (1) that petitioner had failed to make a clear objection to the pertinency of the questions which he refused to an-

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swer as required by *Barenblatt* v. *United States*, 360 U.S. 109, 124, and (2) that the record of the subcommittee hearings fully supported the finding of the district court, which was affirmed by the court of appeals, that petitioner was aware at the time he appeared before the subcommittee that the subject under inquiry was Communist infiltration of the press.

In a footnote (p. 15, fn. 7) the government replied to petitioner's claim (Pet. 26–27) that an Assistant United States Attorney had stated in the district court in a bill of particulars that the subject under inquiry was that stated in the authorizing resolution as to Communist activities generally, not the lesser inquiry of Communist infiltration in the newspaper field. This footnote indicated that the "bill of particulars" referred to by petitioner was actually merely an oral statement by the Assistant United States Attorney and that this statement concerned the extent of the subcommittee's authority to investigate, not the actual subject under inquiry. Petitioner, in his Reply Memorandum, challenges these parts of the footnote as "misleading" (p. 5).

We agree with petitioner that the footnote was incorrect and may have been inadvertently misleading. As petitioner points out in his Reply Memorandum and as the record shows (see the Appendix, *infra*, pp. 7–11),[1] the statement of the Assistant United States Attorney was made in lieu of a formal, written bill of

[1] The entire colloquy, as included in the Joint Appendix (pp. 2–6), is set forth in the Appendix, *infra*, pp. 7–11.

particulars. The Assistant United States Attorney specifically said that the subject under inquiry before the subcommittee was the full scope of the authorizing resolution and not a "smaller, more limited inquiry" (see the Appendix, *infra*, p. 10). His statement was devoted to the issue of pertinency and not merely to the subcommittee's authority (as we said in our Brief in Opposition).

Despite, however, the error in the Government's Brief in Opposition, we continue to emphasize that petitioner's basic contention is without substance for the reasons primarily relied upon in that brief. Petitioner did not properly raise this objection because, as the record shows, he was aware of the subject being investigated. In fact, besides the evidence cited in our original brief (pp. 14–15), petitioner's statement (which he read to the subcommittee) concerning his reasons for refusing to answer also demonstrates his awareness that the subject under inquiry was Communist infiltration of the press (see the opinion of the district court, Pet. 42). This statement is devoted almost in entirety to petitioner's objection that the subcommittee's investigation was an interference with freedom of the press.[2]

The statement of the Assistant United States Attorney at the trial did not preclude the government from introducing evidence that the subject under inquiry was Communist infiltration of the press. The

[2] Hearings Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, U.S. Senate, 84th Cong., 2d Sess., Part 17, pp. 1723–1725.

latter subject is merely one portion of the broader subject of Communist activities in general which the resolution authorizes the subcommittee to investigate. Thus, when the subcommittee is investigating the narrower problem of Communist infiltration of the press, it is simultaneously investigating the broader subject which it is authorized to investigate. The introduction of evidence on the narrower problem was therefore consistent with the statement of the Assistant United States Attorney that the subject under investigation was the full scope of the subcommittee's authority.

While the Assistant United States Attorney did state that there was no "smaller, more limited inquiry being conducted" (*infra*, p. 10), he apparently meant that the subcommittee was not *restricted* to showing any inquiry less than the full authorizing resolution. In fact, he specifically said that his remarks as to the exact subject under inquiry should not be taken to limit the scope of the government's proof at the subsequent trial (*infra*, p. 8):

> That [the subject under inquiry] is a matter of fact that will come out at the trial and the proof. [Petitioner] is not entitled to have it in advance because the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing.

Thus, the oral statement was not binding on the government so as to restrict the exact subject under inquiry which the government intended to prove.

In any event, even if it can be said that there was a variance between the prosecutor's oral statement as to the subject of the inquiry and the proof introduced at petitioner's trial, the variance would not be a material one. The crucial question when there is such a variance is whether the defendant has been prejudiced. See *United States* v. *Costello,* 221 F. 2d 668, 675 (C.A. 2), affirmed, 350 U.S. 359; *Neal* v. *United States,* 185 F. 2d 441 (C.A. D.C.), certiorari denied, 340 U.S. 937; *Shayne* v. *United States,* 255 F. 2d 739, 743–744 (C.A. 9), certiorari denied, 358 U.S. 823; *McKenna* v. *United States,* 232 F. 2d 431, 436–437 (C.A. 8). Here, petitioner does not claim and has never shown surprise or any other basis for prejudice.[3]

**CONCLUSION**

It is respectfully submitted that, for the foregoing reasons and those stated in the Government's Brief in Opposition, the petition for certiorari should be denied.

J. LEE RANKIN,
*Solicitor General.*

SEPTEMBER 1960.

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[3] The variance here, if any, was not nearly so great as that in *Stirone* v. *United States,* 361 U.S. 212. Moreover, a variance between the indictment and the proof introduced is considerably more serious than a variance between the bill of particulars or binding oral statement and such proof. The grand jury might not have been willing to return an indictment with a charge conforming to the proof actually introduced. Thus, potential prejudice is more likely to be inherent in a variance with an indictment. On the other hand, since the trial court could have allowed amendment of the bill of particulars even during the trial, substantial prejudice must be shown as to any variance with a bill of particulars.

## APPENDIX

The following statements appear at pp. 2–6 of the Joint Appendix:

Mr. SILARD.

* * * * *

I would like to ask Your Honor if he feels that the indictment is nevertheless sufficient, to consider the possibility of a bill of particulars so that we may know before trial what authority this committee presumed to exercise, what the scope and nature of the grant of that authority was and what the nature of the inquiry was, because as of now we stand helpless to know what these questions were pertinent to, what the inquiry was, who authorized the inquiry, and what the scope of the authority of the committee was.

* * * * *

Mr. HITZ. Your Honor, the indictment sets out the authority for this committee to act; most particularly, Senate Resolution 366 is the resolution of Congress which expands very slightly the authority which was given to this committee, that is, the Committee on the Judiciary by the Reorganization Act of 1946. This special resolution is one which gives this committee or any duly authorized subcommittee the authority to make investigations for legislative purposes in the field of subversive activities. That can, of course, be obtained by anyone who is interested in it from the Senate of the United States.

We cite it and it can be obtained. That will, of course, outline the authority of this particular committee.

We state in the indictment that the Internal Security Subcommittee, briefly put, was the body of the Judiciary Committee which was conducting the particular hearings under the resolution which gave these powers to the full committee and, when we state in the fourth line that this subcommittee of the full committee was conducting hearings pursuant to the authority which created this power in the committee, we are, of course, stating that they were conducting hearings which properly were before that committee. That is the conclusion, of course, from what we have stated here.

When we state that the questions which were refused of answer were pertinent to the inquiry which was being conducted, we are, of course, stating these were proper questions and that it was before an inquiry which was authorized by the resolution.

The COURT. Defense counsel's point there is that you do not state what the inquiry was about.

Mr. HITZ. That is right.

The COURT. What do you say about that?

Mr. HITZ. That is a matter of fact that will come out at the trial and the proof. He is not entitled to have it in advance because the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing.

The COURT. I notice that Count 1 attempts to indicate that the subject of communism was being inquired into. Does the resolution creating the committee and the subcommittee authorize the subcommittee to investigate communism?

Mr. HITZ. Not in so many words. In general, it does.

The COURT. The subject was within the general jurisdiction?

Mr. HITZ. Yes. It comes in part 3 of the resolution which states, "the extent, nature and effects of subversive activities in the United States" and so forth. That, of course, embraces communism.

Let us assume that the particular inquiry at the moment might have been subversive activities in the field of education. That does not limit and does not restrict the full authority that was granted to this committee by the resolution and, therefore, the committee, through this subcommittee, could make all inquiries that were authorized by it to make. For the defendant to know what particular inquiry may have been uppermost in the minds of the committee, without restricting its general authority, would be of no help because the pertinency of the question asked would be as broad as the authority which the committee had, and that is stated in the resolution itself which may be obtained, so that we say not only is the indictment sufficient as it stands to charge the offense, but it is sufficient, without further particularization, to inform the defendant of the charge that he must meet and to protect him from a second prosecution.

* * * * *

The COURT. I am not going to pass on an informal request for a bill of particulars unless the Government consents that the matter be handled that way, because the Government is entitled to notice of such an application and is entitled to give it consideration.

Mr. HITZ. I will waive written notice of the bill of particulars, if Your Honor would care to hear it orally from counsel.

The COURT. I shall be glad to hear it.

Very well, I will hear your application.

Mr. SILARD. The request of the bill is for the same information as the first point of our motion to dismiss, that is, for the specific authority under which the subcommittee was said to

be conducting hearings and, secondly, for the nature of the question under inquiry before said committee.

The COURT. What do you say about that, Mr. Hitz?

Mr. HITZ. The resolution, No. 366, provides in two places for the duties of the full committee which were authorized by this particular resolution to be carried on by any duly authorized subcommittee thereof.

In that sense, I am supplying at this moment the authority for the subcommittee named in the indictment to carry on the purposes of the full committee contained in the resolution.

We will prove, at a later time, the transfer of the authority contained in this particular resolution from the full committee to the subcommittee.

As to the second asking, the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.

This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose so that, in that sense, the asking No. 2 of counsel will be supplied by his reading the resolution.

The COURT. It seems to the Court that the Government has supplied the bill of particulars orally.

Mr. SILARD. Except in this one sense: that I asked, in by motion to dismiss—perhaps I didn't do it well—the nature and scope of the grant to this committee. That has not been given to us.

The COURT. I think it has been sufficiently given.

I will deny the motion for a bill of particulars in view of the fact that the oral statement just made by counsel for the Government will be sufficient compliance if the motion were granted. You have the particulars.

* * * * *

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